IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error.

ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION. HON. FRANK H. RUDKIN, Judge.

Brief for Plaintiff in Error

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TO THE HONORABLE JUDGES OF SAID CIRCUIT COURT OF APPEALS:

This is an action of ejectment brought to recover possession of certain lands in the valley of the Duwamish River, but now within the city limits of the city of Seattle. The original tract contained 160 acres. The defendant has had control of the same since 1869. The present status of the prop-

erty is, that the defendant is using a portion of the tract in connection with its county hospital, which portion is known as the "King County Hospital Grounds;" it is using a portion as a poor farm, which portion is known as the "King County Farm;" it has subdivided a portion, calling it the "King County Addition to Seattle," and has sold off the bulk of that addition in lots; it has subdivided another portion, calling it "King County Second Addition to Seattle," and has sold off a considerable part of that addititon in lots; and the original tract is now traversed by many highways and railroad rights of way. The plaintiff is not seeking to disturb the public or railroad easements acquired in the property, nor the lots sold to innocent purchasers by the defendant. It is only sought to recover the King County Hospital Grounds, the King County Farm, and such lots as are unsold in the King County Additions. The plaintiff also concedes that the defendant may retain as betterments, the valuable buildings put by defendant upon the King County Hospital Grounds.

The amended demurrer to the amended complaint was sustained by the court below, and judgment of dismissal and for costs entered against the plaintiff, who by this writ of error brings that judgment to this court for review.

Consequently the whole case is stated in the amended complaint, which shorn of superfluous verbiage alleges as follows:

I.

That plaintiff is a subject of the king of Norway.

II.

That defendant is a municipal corporation of the state of Washington.

III.

That the property in dispute exceeds in value $300,000.

That the case involves the following grounds of federal jurisdiction:

1. Diversity of citizenship of plaintiff and defendant.

2. The construction of Amendment V. of U. S. Constitution inhibiting the taking of private property for public use without just compensation.

3. The construction of Amendments V. and XIV. of U. S. Constitution, inhibiting the deprivation of property without due process of law.

4. The construction of Sec. 1907, Rev. Stat. U. S. 1874, creating the courts of Washington Territory.

5. The construction of Sec. 1851, Rev. Stat. U. S. 1874, vesting the legislative powers of Washington Territory.

6. The construction of Sec. 1924, Rev. Stat. U. S. 1874, restricting the legislative powers of Washington Territory.

IV.

That in March, 1865, Lars Torgerson died, intestate, being a resident of King County, Washington Territory, and being commonly known by the name of John Thompson.

V.

That prior to his death Lars Torgerson, under the name of John Thompson, acquired title in fee to the 160 acres in question, by deed from Joseph Williamson and William Greenfield. That Williamson and Greenfield acquired title to said land by deed from Luther M. Collins. That Collins acquired title to said land by patent from the United States. That all said conveyances were duly recorded.

VI.

That the heirs of Lars Torgerson were two brothers, one sister and the children of a deceased sister, all Norwegian subjects. That plaintiff is a son of one of the sisters. That all other heirs have conveyed their interests in said land to plaintiff by deed, and he is now sole owner in fee of said land.

VII.

That Lars Torgerson was born at Porsgrund,

Norway, Aug. 30, 1829. That at the age of 21 he shipped as a sailor, and went by way of England to Australia, and thence in 1856 to San Francisco. That at that port he deserted his ship on account of abuse, changed his name to John Thompson to avoid arrest for desertion, came to Elliott Bay neighborhood, and resided until his death in 1865 in Kitsap and King Counties in Washington Territory.

VIII.

That the heirs of Lars Torgerson only learned of his death, of the place thereof, and of his change of name within the last three years. That since learning of the same they have been diligent in collecting proofs of the identity of Lars Torgerson and John Thompson, and of their relationship to him.

IX.

That March 26, 1865, there was filed in the Probate Court of King County, Washington Territory, the following document:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

Dated March 11, 1865. H. L. Yesler
J. Williamson."

That said document was the only one purporting to be a petition for the appointment of an administrator of the estate of John Thompson ever filed in said court.

That thereupon said court entered the following order:

"Whereas, John Thompson, of the County aforesaid, on the —— day of March, 1865, died intestate, leaving at the time of his death property subject to administration.

"Now, therefore, know all men by these presents, that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

Dated March 26, 1865. Thomas Mercer,
Probate Judge."

That said order was the only one ever entered in said court purporting to appoint an administrator of the estate of John Thompson.

That May 26, 1868, the County Commissioners of King County, Washington Territory, filed in said probate court a petition, stating they were informed that Thompson's administrator had a large sum of money in his hands; that no heirs had appeared to claim the same; that they believed no heirs were known to exist; that King County was entitled to the balance in the administrator's hands; and praying an order requiring Bagley to account and pay the balance in his hands to the Treasurer of said King County.

That on the day the last described petition was filed there was issued a citation by said court, reciting the contents of said petition, and commanding the administrator to show cause why the orders asked for should not be entered; which citation was served on said administrator on the next day, May 27, 1868.

That July 27, 1868, Bagley filed a report, referring to the said citation; stating that he had been earnestly requested by the countrymen of John Thompson to keep matters in his hands until he could ascertain the whereabouts of the heirs, as they were well assured that heirs were living in Sweden; and asking a continuance until the next term, when if no word was had from the heirs he would turn over the property in his hands to King County, and make a final report.

That Oct. 29, 1868, John J. McGilvra, filed in said court, an affidavit in which he states that he was employed as an attorney by the King County Commissioners, to place the Thompson "estate in such a position that said county to whom said estate by law escheats, may have the full benefit thereof," and asking for the vacation of some order entered at the previous term.

That Feb. 10, 1869, a petition was filed in said court by King County, asking for a removal of Bagley as administrator on various grounds.

That Feb. 12, 1869, Bagley filed his petition, reciting that his final account as administrator had been approved; that the debts of the estate had been paid; that no heirs of John Thompson have been found; and praying he might be discharged, "and that after due notice given and proceedings had, the estate remaining in his hands, as petitioner aforesaid, may be turned over to King County, Washington Territory; or such other or further order made as may be meet in the premises."

That March 29, 1869, an order was entered by said court repeating the recitals of the last described petition of Bagley, and commanding "that all persons interested in the estate of the said John Thompson, deceased, be and appear" before the court, on April 26, 1869, "then and there to show cause why an order of distribution should not be made of the residue of said estate among the heirs of said deceased according to law." That said order was duly published four weeks from April 5, to April 26, 1869, both inclusive.

That May 26, 1869, an order of distribution was entered in said Thompson estate, repeating the recitals of the petition for distribution; reciting a continuance from the day first set by the order published; reciting that the inventory and appraisement, final account, and notice to creditors were all in due form; reciting that the estate had been fully administered and all debts paid; reciting "that said decedent died intestate in the County of King, Washington Territory on the —— day of March, 1865, leaving no heirs surviving him;" reciting "there being no heirs of said decedent, that the entire estate escheat to the County of King in Washington Territory." That said decree then proceeds as follows:

"It is hereby ordered, adjudged and decreed that all the acts and proceedings of said administrator, as reported by this court, and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting the estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore dis-

tributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the county of King in Washington Territory."

That said decree then proceeds to discharge the administrator from his trust. That the said decree then closes in the following language:

"The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

1st. Cash to-wit: $343.83 gold coin.

2nd. And Real Estate, to-wit: One hundred and sixty acres of land on Duwamish River in King County, W. T. more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson dated January 19th, A. D. 1865, and recorded in Volume 1 of Records of King County, W. T., on Pages 458, 459 and 460.

3rd. A Lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid."

That said decree is null and void; that said probate court was wholly without jurisdiction to vest, transfer, convey, fix or pass upon the title to said land and had no power or authority to declare the same escheated.

That all of defendant's claims to said land, acts done in reference to said land, and control exercised over said land have been under and by virtue of said null and void decree.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor any other writing, record or document evidencing or purporting to evidence any title on its part in or to said land.

That neither the defendant, nor any other public officer or authority has ever instituted any suit or legal proceeding to escheat said land.

That neither the defendant, nor any other public officer or authority has ever instituted any suit or legal proceeding to have any title the defendant might have in said land quieted or confirmed.

X.

That since the entry of said decree of distribution said land has been marked on the county assessor's rolls as exempt from taxation as county property.

That about 1885 the territorial County of King occupied a certain portion of said land generally known as the "King County Farm," and since the organization of the State of Washington the defendant has succeeded to such occupancy; that the same has not been used for any county purposes, but has been let out to tenants for the purpose of producing a monetary income for the defendant.

That about the year 1900 the defendant occupied a portion of said land generally known as the "King County Hospital Grounds," and has since been using

the same for county hospital purposes, having placed thereon a valuable hospital building with its appurtenances.

That in 1892 the defendant subdivided a portion of said land calling the same the "King County Addition to Seattle," and has sold off all of the same to private parties, except 13 lots in said addition.

That in 1903 the defendant subdivided a portion of said land calling the same "King County Second Addition to the City of Seattle," and has sold off about half of the same to private parties.

XI.

That the King County Farm, King County Hospital Grounds and two King County Additions together constitute the tract of 160 acres which was the property of Lars Torgerson; but a number of highways and railroad rights of way now cross the same.

XII.

That the plaintiff is entitled to all betterments placed upon said land prior to 1903, but hereby expressly waives all claim to the same, and admits that the defendants may be re-imbursed for the same under the law, in the same manner as if the same had been made on said land since 1903.

PRAYS that plaintiff may recover possession of land composing the King County Farm, the King Coun-

ty Hospital Grounds, and the unsold portions of the King County Additions still in the control of the defendant; and for the costs of suit.

THE AMENDED DEMURRER states six grounds as follows:

"1. That the plaintiff has no legal capacity to maintain this action.

"2. That the said complaint does not state facts sufficient to constitute a cause of action against the defendant.

"3. That said action has not been commenced within the time limited by law therefor.

"4. That said complaint shows upon its face that the plaintiff has been guilty of laches and of procrastination in the bringing of said action.

"5. That the Court has no jurisdiction over the person of defendant, or over the subject matter of said action.

"6. That plaintiff's complaint shows that plaintiff by his own acts, deeds and omissions, is now estopped from bringing and maintaining this action or from asserting any right, title or interest in and to the property described in said complaint."

The grounds of (1) "No capacity of plaintiff to sue," and (5) "No jurisdiction of court over person or subject matter," are certainly not stated seriously.

The ground of (2) "General demurrer," almost comes in the same category, because as the plaintiff deraigns a good title in fee from the United States Government, and alleges that the defendant is in possession of the land in question without any claim of title save under a void order of court, certainly he states a good cause of action in ejectment.

The foregoing grounds were not discussed in the Court below, and we shall assume they are not going to be in this Court. This only leaves three grounds of demurrer to be considered, which are, (3) "The Statute of Limitations;" (4) "Laches," and (6) "Estoppel."

ASSIGNMENT OF ERRORS.

1. The Court erred in sustaining the defendant's amended demurrer to the plaintiff's amended complaint.

2. The Court erred in not overruling the defendant's amended demurrer to the plaintiff's amended complaint.

3. The Court erred in not requiring the defendant to answer the amended complaint of the plaintiff.

4. The Court erred in rendering and entering the judgment in the above entitled action dismissing the action of the plaintiff.

ARGUMENT.

I.

NO FACTS ON WHICH TO BASE LACHES AND ESTOPPEL ARE SHOWN IN THE COMPLAINT, NOR COULD THEY BE SET UP AS DEFENSES TO THIS ACTION.

(A) We take the liberty of citing to the Court

the following recognized definitions of Laches and Estoppel:

"LACHES is a neglect to do what in the law should have been done for an unreasonable or unexplained length of time under circumstances permitting diligence."

24 Cyc., p. 840.

"ESTOPPEL is, where one voluntarily, by his words or conduct, caused another to believe the existence of a certain state of things, and induced him to act on that belief, so as to alter his previous condition for the worse, in that case the former is concluded from averring against the latter a different state of things as existing at the same time."

Fetter, on Equity.

ESTOPPEL BY SILENCE: "To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. In other words, when the silence is of such a character and under such circumstances that it would become a fraud upon the other party to permit the party who has kept silent to deny what his silence has induced the other to believe and act upon it will act as an estoppel."

16 Cyc., p. 759.

FAILURE TO ASSERT TITLE OR RIGHT: "Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his right and fails to assert his title or right, he will be estopped afterward to assert it; but

it must appear that it was his duty to speak, and that his silence or passive conduct actually misled the other to his prejudice."

16 Cyc., p. 761.

The facts shown in the complaint can not possibly bring this case within any one of these definitions. Laches and estoppel are one and the same in principle, the only difference being that the former is based on acts of omission, and the latter on acts of commission. The heirs of Lars Torgerson knew absolutely nothing of the facts out of which this case arises, until within three years last past. The defendant knew all about the facts, even to the point of knowing that Torgerson had heirs somewhere in those countries composing Scandinavia The heirs of Torgerson never did anything on which the defendant based any of its acts, because they did not come in contact with the defendant and did not know of its existence. The defendant did know there were such persons as the heirs, and attempted to appropriate their property without their knowledge. If there is any fraud shown here, it is on the part of the defendant. We could cite the court to almost innumerable cases, but will cite only one, because of its resemblance to the case at bar, in lack of knowledge on the part of the plaintiff, and in the fact that it was a county trying to appropriate property that did not belong to it.

In *Young vs. Board of Commissioners,* 51 Fed. Rep. 585, a suit was brought in ejectment to recover possession of certain land which had been dedicated as

a cemetery by the father of the plaintiff. The plaintiff had been away from the city in which the land was located for 40 years, and upon his return found that the cemetery use had been abandoned, and that for ten years before his return a county court house had been standing on the land. Taft, Judge, in his opinion, says:

"This is an action at law. The form of procedure is under the code of Ohio, but the remedy is substantially that of ejectment at common law. Plaintiff must recover, if at all, on his title as it is. If equitable remedies are needed to perfect his right to possession, he fails. In like manner, only defenses at law are available here. The defense of estoppel *in pais,* pleaded in the answer, would seem to be of equitable cognizance, and hardly to be urged or considered here. However that might be, if it were a valid plea, there is no evidence to support it, because the court house was erected 10 years before the plaintiff (who was not in Youngstown from 1848 to 1888) knew anything of the abandonment of the burying ground or its subsequent use for general county purposes."

In the case at bar there is absolutely nothing in the complaint to render applicable the principles of Laches or Estoppel.

(B) But even if this complaint did show grounds for the application of the equitable doctrines of laches and estoppel, they could not be utilized as defenses to this legal action of ejectment. Whatever may be allowable under the code of Washington, as to pleading equitable defenses to actions at law, it can not be done in the federal courts.

"The difference between causes of action at law

and in equity is matter of substance, and not of form. In the national courts the ineradicable distinction between them is sedulously preserved in the forms and practice available for their maintenance as it is in the nature of the causes themselves and in the principles on which they rest. A legal cause of action may not be sustained in equity, because there is an adequate remedy for the wrong it presents at law, and it is only where there is no such remedy that a suit in equity can be maintained. Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. In the federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense available at law. *Bagnell v. Broderick,* 13 Pet. 436, 10 L. Ed. 235; *Foster v. Mora,* 98 U. U. 425, 428, 25 L. Ed. 191; *Scott v. Armstrong,* 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Linsay v. Bank,* 156 U. S. 485, 493, 15 Sup. Ct. 472, 39, L. Ed. 505; *Schoolfield v. Rhodes,* 82 Fed. 153, 155, 27 c. c. a. 95, 97; *Davis v. Davis,* 72 Fed. 81, 83, 18 C. C. A. 438, 440."

Highland Boy G. M. Co. vs. Strickley, 116 Fed. 852.

To like effect are:

City of New Orleans vs. L. Construction Co., 129 U. S. 45;
Robinson vs. Campbell, 3 Wheat. 212;
Doe vs. Aiken, 31 Fed. 393-395;
Hickey vs. Stewart, 3 How. 750-759;
Singleton vs. Tanchard, 1 Black 342;
Newman vs. Jackson, 12 Wheat. 570-572;
Burnes vs. Scott, 117 U. S. 582-587.

This we believe disposes of the questions of laches and estoppel as far as the case at bar is concerned.

II.

THE TERRITORIAL COUNTY OF KING, TO WHOSE TITLE, IF ANY, THE DEFENDANT SUCCEEDS, NEVER ACQUIRED ANY TITLE TO THE LAND IN QUESTION BY ESCHEAT.

By virtue of certain provisions of the Constitution of Washington, the defendant succeeded to all rights of the County of King, of Washington Territory; which it is unnecessary to cite, unless this statement should be challenged. Lars Torgerson, then passing under the name of John Thompson, died in March, 1865. The County of King (a Territorial Municipality) laid claim to his estate in the Territorial Probate Court which was administering the same and that Court entered an order assuming to give it to the County, and that County, and its successor, the defendant, have retained control of the land involved ever since. There was at the time of Thompson's (by which name we will call him, now that we must discuss the probate records in which he is so designated) death a law in the territory assuming to give escheated lands to the county in which they were located. The county claimed the land under this law. We insist that said land never escheated to the County of King for the following reasons:

A. The Territory was not a Sovereign, but a municipal corporation.

B. The Organic Law of the Territory conveyed to it no property rights of the United States.

C. The territorial legislative act giving escheated property to the counties trenched upon the primary disposal of the soil in a manner forbidden by the Organic Law.

D. The territorial legislative act giving escheated property to the counties was invalid under the Organic Law because its title was not broad enough to cover the subject matter.

E. There was never any Office Found.

A.

Kent's definition of escheat (4 Com. 423) is:

"When the blood of the last person seized became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or the lord of the fee, from whom it proceeded, or to his descendants or successors."

The Territory never owned this land, and so it could not revert to it as the original grantor from whom the title proceeded. It could not take it as lord of the fee or sovereign, because it was not a sovereign. There have been many definitions given of a territory, but they all resolve themselves down to a statement, that a territory is a sub-government established to assist the sovereign in administering the government; or to use the common designation of such a sub-government, a municipal corporation.

The United States was the original owner of the soil *in allodium,* and also the Sovereign. It comes within both of the descriptions in the definition of the person who should take in case of escheat.

Under our system of government all property that escheats in a territory, goes to the United States.

Williams vs. Wilson, Martin & Yerger (Tenn.) 248, was a case where one, Johnston, died the owner of certain lands, but being an alien. The land in question was situated in that territory which formerly belonged to North Carolina, but was ceded by that state to the United States in 1789, and in which was organized the Territory of Tennessee. Johnston died before the State of Tennessee was admitted. The Court in speaking of this matter says:

"All lands which might escheat after the cession act would of course escheat to the sovereign power, the government of the United States until the formation of our constitution, and afterwards to this government."

The Supreme Court of Alabama in *Etheridge vs. Doe,* 18 Ala. 565, cite *Williams vs. Wilson* with approval.

The Supreme Court of Montana concurs in this view in *Territory vs. Lee,* 2 Mont. 124.

The Supreme Court of Iowa does the same in *King vs. Ware,* 4 N. W. 858.

The Supreme Court of the United States does like-

wise in *Church of Jesus Christ of Latter Day Saints vs. United States*, 136 U. S. 1.

If then there was any escheat at all, it did not pass the title to the Territory or its counties, but there was a reversion to the United States. The County of King and its successor have been squatters on the public domain, and could acquire no title whatever which they can set up against us. We can show a title from the United States which will protect us against any attack from them, but the County can show no title whatever. It is a mere squatter or trespasser.

B.

The right to take back escheated lands by reversion, upon failure of heirs of the last tenant in fee, was a property right belonging to the United States, and there was no way for it to get into the territory, or its grantees, unless the United States had in some way conveyed or granted it to the territory. If a new state were brought into existence with full sovereign power, all rights and incidents of sovereignty would vest in it, except such as remained in the general government as part of its powers under the constitution. But the organization of a municipality for governmental purposes, would not vest such municipality with any property rights of the United States, unless expressly given to it. No conveyance or grant of such rights can be found. No warrant for the territory's action in assuming to claim these reversionary rights in land, and

transfer them to its counties, can be found unless it be derived from the grant of legislative powers to the territory contained in Sec. 1851, Rev. Stat. of U. S. 1874, which is as follows:

"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

This is a grant of law making power, pure and simple. It is no conveyance of property rights. On the contrary, it mentions the property of the United States, and commands the territory not to meddle with it. It forbids it to interfere with the primary disposal of the soil, and forbids it to attempt to tax the federal property. The escheat of lands was a subject matter which neither the territory, nor any of its branches, executive, legislative or judicial, had any power to interfere with.

C.

Let us argumentatively concede that the act of the territory giving escheated property to its counties was not a high-handed attempt to confiscate federal property, but was the passage of a law. Nevertheless, it was one of the laws which the territory was by its Organic Law expressly forbidden to pass. The grant of legislative powers, which we have above set out, specifi-

cally provides, "no law shall be passed interfering with the primary disposal of the soil."

When the United States as owner of the land *in allodium* granted an estate in fee, in case there was a failure of heirs of the tenant in fee, the land would revert to the United States. The United States would not take under the decedent, for his title had ceased, had become extinct. It would again hold the land by its original right *in allodium,* and when it again granted the land to another tenant, such re-grant would be a primary disposal of the soil, a grant emanating from the original owner *in allodium.* Any law passed by the territory the effect of which would be to cut off the reversion, and divert it from the United States to the territorial counties, and prevent a new disposal of the same by the United States, would certainly be an interference with the primary disposal of the soil.

This view of the law is very clearly stated by the Supreme Court of Montana, in *Territory vs. Lee,* 2 Mont. 124. In this case the Territory of Montana had assumed to pass a law, whereby it was provided that all mining claims which were acquired by aliens should escheat to the Territory. It is true, that these mining claims were only easements in the land, but, in principle, there is no difference between an easement and the entire usufruct, both are real property. The same estates can be created in each. There can be an estate in fee in an easement, and an estate in fee in the entire usufruct of the land, and the same principles would apply as to their being escheated.

In this case the court says:

"The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title nor shadow of title thereto, but by the operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by force of this statute, it becomes the owner of property in which it never had any interest and which never belonged to it, and it forfeits the property of an alien and calls it its own, while if any forfeiture takes place for any reason whatever, the property thus forfeited necessarily belongs to the United States. The Territory can not acquire title to property that does not and never did belong to it, so easily as this."

"Is this statute in harmony with the Organic Act of the Territory?"

"The Organic Act provides, section 6, that the territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the Organic Act whereby a temporary government is created for the Territory, the general government being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations directing how its property shall be disposed of, and how title thereto shall be conveyed. The Territory can enact no valid law that, in any manner, impedes, modifies or varies the operation of the laws of the general government as to the disposal of its lands. Neither can the Territory do, by indirection, what it is prohibited from doing directly, so that, if any Territorial statute, enacted for a local, or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of congress as to the disposal of the public lands of the territory, such statute is necessarily void. The statute in question provides that the mining claims held by aliens shall be forfeited to the Territory, so that the Territory becomes the owner of the possessory title to such claim. Laying

aside the fact that the Territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler. If the possessory title is forfeited, the property should again become subject to location by the persons entitled to make such location, but the Territory comes forward and says, by its legislature, "that although the title to this property is forfeited, and it thereby becomes subject to entry and location, yet I have acquired this property, and if anyone obtains possession of it they must purchase of me."

In *King vs. Ware,* 4 N. W. 858, (Ia.) the court had occasion to construe this inhibition against interference with primary disposal of the soil in a case where such inhibition was a part of the Organic Law of the State of Iowa. The Enabling Act under which the states of Iowa and Florida were admitted to the Union in 1845, imposed such an inhibition upon the states, and required them to irrevocably pledge themselves to obey the inhibition. The state of Iowa passed an act thus pledging itself in 1849.

This case does not in its facts, resemble the case at bar, but it does enunciate the principle that a law seeking to cut off from the United States the reversion of escheated lands, is one interfering with the primary disposal of the soil. In this case an alien had acquired certain lands from the United States by patent. After his death, it was sought to claim that the property had escheated to the state of Iowa by virtue of an act of that state forbidding aliens to hold land. The court says:

"It was not within the power of the state to question his title by escheating the lands." The application of this principle in this case is much stronger than what we are asking in the case at bar. In the case at bar, the inhibition was laid upon a Territorial government, which was not presumed to have any other powers than those specifically delegated to it, and which was not a sovereign. In the Iowa case, the inhibition was laid upon a sovereign state which would be presumed to have all powers of government except such as were forbidden to it by its Organic Law.

It seems to us that it is beyond dispute that the passage of the escheat law by the territory of Washington, was an interference with the primary disposal of the soil by the United States Government.

D.

Congress saw fit to place certain restrictions upon the legislative power of the territories, and these are to be found in Sec. 1924, Rev. Stat. of U. S. 1874. These restrictions do not concern the question now under discussion, and so we will not enumerate them. The section closes with the following language:

"To avoid improper influences, which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

A similar provision is to be found in the Constitution of almost every state in the Union, and while some courts have been very strict and some very liberal in construing the title of acts, still all agree that when a portion of an act is entirely foreign to the object of the title, the same must be held invalid. If such portion is not severable from the remainder of the act, the whole act falls. If it is severable from the remainder of the act, and its absence does not render inoperative the remainder of the act, then such portion falls, and the remainder of the act stands. These principles which we have stated, are announced in reference to the Constitution of the state of Washington in *Bradley E. & M. Co. vs. Muzzy,* 54 Wash. 227, which refers to, and is based upon *Harland vs. Territory,* 3 Wash. Ter. 131, where they are laid down in reference to the identical Organic Law which is now under consideration.

The Probate Act of Washington Territory, originally passed in 1854, was re-enacted with little change in 1860. It will be found in the Wash. Sess. Laws 1859-60, pp. 165-237. The title of the act is:

"AN ACT DEFINING THE JURISDICTION AND PRACTICE IN THE PROBATE COURTS OF WASHINGTON TERRITORY."

It is divided into eighteen chapters, sixteen of which seem to properly refer to the jurisdiction and practice of the Probate Courts, but Chapters 2 and 14 have nothing to do with the title of the act. Chapter 2 is in reference to the making and construction of Wills, and has

absolutely nothing to do with the jurisdiction and practice of the court. In like manner Chapter 14 regulates the descent of real estate, and also has absolutely nothing to do with the jurisdiction and practice of the court. This chapter 14 names those who shall successively inherit the real property of a decedent who dies intestate, and at its end, provides for an escheat of property to the county in case there is a failure of heirs. The opening and conclusion of this chapter are in the following language:

"When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts as follows:" * * * "8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

This Chapter 14 regulating the descent of real property, can be completely severed from the remainder of the act, and as it treats of a subject matter and object which cannot by any possible construction come within the title of the act, it must fall and be held to contravene the Organic Law. The remainder of the act still composes a consistent whole, and therefore is not injured by the insertion of this improper but distinct matter. This is the only provision in the territorial laws in reference to what shall become of escheated property, and if it is invalid, as is the case, it simply leaves the common law on that subject in force. Under that, the sovereign, the United States, would take all such

lands by reversion. It does not seem to us as though the question of the invalidity of this act under the Organic Law, could be called even debatable.

E.

As a matter of fact this property never did escheat. At the time of his death Lars Torgerson, alias John Thompson, left surviving him in Norway, two brothers, one sister and the children of a deceased sister, and a son of one of his sisters claiming in his own right as heir and as grantee of the interest of all the other now living heirs, stands now before this court in the person of the plaintiff, demanding possession of the lands which belonged to his uncle at the time of the latter's demise. All the heirs of Torgerson, alias Thompson, living at the time of his death, were subjects of the King of Sweden and Norway, and the plaintiff who brings this suit, is the same. Although these heirs were aliens, they were able to inherit. More than a year before the death of Torgerson, alias Thompson, the legislature of the territory of Washington (Sess. Laws 1863-4, p. 12) passed "An Act to enable aliens to acquire and convey real estate," and which was in the following language:

"Section 1. BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, That any alien may acquire and hold lands, or any right thereto, or interest therein, by purchase, devise or descent; and he may convey, mortgage and devise the same, and if he shall die intestate, the same shall descend to his heirs, and in all cases such lands shall be held, conveyed, mortgaged or

devised, or shall descend in like manner and with like effect as if such alien were a native citizen of this territory, or of the United States."

Sec. 2. The title to any lands heretofore conveyed shall not be questioned, nor in any manner affected by reason of the alienage of any person from or through whom such title may have been acquired."

But these heirs also claim by a higher right. The first Treaty ever made by any foreign government with the United States of America was concluded April 3, 1783, with Sweden and Norway, and the same was extended by a new Treaty entered into July 4, 1827. By Article VI of this Treaty, it is provided that the subjects and citizens of the contracting parties, shall be allowed to inherit property in the countries of each other. That this Treaty covers real estate, has been held by the Supreme Court of Washington in the case of In re Sixtud's Estate, 58 Wash. 339, and the same construction has been put upon this Treaty by the Supreme Court of Illinois in Adams vs. Akerland, 49 N. E. 454.

But though as a matter of fact there never really is any failure of heirs, because every person must somewhere on the globe have blood relatives, still there is such a thing as failure of heirs as a matter of law. The sovereign power can take steps in its own courts to have it judicially determined that there are no heirs, which proceeding has in the English law the name of "office found." When there has been such an official determination that heirs cannot be found, then the natural presumption of heirship is destroyed, and thereupon

the reversion to the sovereign is legally effected; though when it has thus been effected, such action relates back to the time of the tenant's death, and the sovereign can claim all property rights that have enured since that time. But until there has been "office found," no lands can escheat. At the time of the death of Torgerson, alias Thompson, there was a law in the territory of Washington providing a procedure for escheating property. Of course we claim that all laws on the subject of escheat passed by the territory are nullities, but for the sake of argument, admitting that the territory could claim escheated property, it was not done properly in accordance with its own laws in reference to the land involved in the case at bar. This method of procedure is fixed in the Civil Practice Act of the Territory, Chapter 52, Sec. 480, Session Laws 1854, page 218, which is as follows:

"Whenever any property shall escheat or be forfeited to the territory, for its use, the legal title shall be deemed to be in the territory, from the time of the escheat or forfeiture; and an information may be filed by the prosecuting attorney in the district court, for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

The sovereign does not take escheated property as a successor to the decedent. For failure of heirs the title of the decedent ceases and terminates; the original title of the sovereign revives and the title of the sovereign is based upon its original ownership, and not upon the

ownership of the decedent. This seems almost too axiomatic to need a citation of authorities, and we will refer the court to only a couple of the numerous ones that exist:

"In no proper sense, we apprehend, can the State be styled an heir, when, in the absence of heirs of every denomination by law capable of succeeding by inheritance, the property of the deceased owner becomes vested in the public, and is at the disposal of the government." * * * "The State is not in reality an heir or a successor, in the technical sense of this word, for it acquires by the title of escheat; that is to say, precisely in virtue of a title which supposes, necessarily, that there are no heirs; which caused Bacquet to say that, when a man dies without heirs, the goods left by his death *non vocantur bona hereditarea sed vacantia nominantur.* In a word, the State exercises in this matter the eminent right of sovereignty, in virtue of which it appropriates all property without a master which is found within its territory." State vs. Ames, 23 La. Ann. 69-71.

"The state, however, does not come in by way of succession, but in the event of the absence of all who are entitled to come in by succession, whether the property be real or personal, it goes to the state by escheat." In re Minor's Estate, 76 Pac. 968 (Cal.)

That it is necessary to have a proceeding of "office found" before title to escheated lands can re-vest in the sovereign, has been held by every court that has had occasion to pass upon this question.

"It seems very clear that, in every case of a failure of succession for want of heirs or kindred of the decedent, an action of escheat becomes necessary to vest the title in the state, whether the estate so escheated consists of real or personal property. And this is the view heretofore expressed by this Court in *People vs. Roach,* 76 Cal. 294; 18 Pac. 407."

In re Minor's Estate, 76 Pac. 968 (Cal.)

"But where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the Commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs, can be ascertained, and if this fact is established in favor of the Commonwealth, it rebuts the contrary presumption, and the Commonwealth, by force of the judgment, and of the statute before cited, become seized in law and in fact. In such case therefore, the Court are of opinion, that an inquest of office is necessary, and that the Commonwealth cannot be deemed to be seized, without such inquest. *Jackson vs. Adams,* 7 Wend. 367; *Doe vs. Redfern,* 12 East 96."

Wilbur vs. Tobey, 33 Mass. 177-180.

"Land is not escheatable as long as there are heirs of the original tenant or grantee.

Escheat is that possibility of interest which reverts to, or devolves on the lord, upon the failure of heirs of the original grantee; and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing, and cannot impair any right or interest acquired under his original grant."

Hall vs. Gittings, 2 Har. & J. 112-125 (Md.)

"When the owner of real property dies intestate without heirs capable of inheriting it, the title thereof devolves, by operation of law, upon the state. Yet, when thus acquired, the state cannot make its title available without first establishing it in the manner prescribed by law. This is done by the institution of a purchase proceeding in the proper court, in the name of the people, for the purpose of proving and establishing by a judicial determination title in the state. The facts essential to the existence of the state's title are specifically set forth in the statute, and must be clearly proven on the hearing. The proceeding is in the nature of an inquest of

office, and the record of it is the only competent evidence by which a title by escheat may be established."

Wallahan vs. Ingersoll, 7 N. E. Rep. 520. (Ill.)

"Helme stood in the same condition, in this respect, as any other citizen of the State; if any natural born citizen dies without heirs, his lands escheat, but the State has no right to enter and take posession until office found, and any grant that they may make of such lands, whether by patent or otherwise, can convey no title, because, until office found, the State had no title, as every man is presumed to have heirs, until the contrary is shown."

Jackson vs. Adams, 7 Wend. 367. (N. Y.)

"By the civil as well as the common law, the King cannot take upon himself the possession of an estate said to have been escheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office."

People vs. Folsom, 5 Cal. 379.

To like effect are:

Peterkin vs. Inloes, 4 Md. 175;
University vs. Harrison, 90 N. C. 385;
Chatham vs. State, 2 Head. (Tenn.) 553;
People vs. Fire Ins. Co., 26 Wend. 218;
Hammond vs. Inloes, 4 Md. 138;
Wideranders vs. State, 64 Tex. 133.

This Washington statute specifically provides what officer shall procure the escheated property; what form of action he shall utilize; what court he shall bring action in, and that in regard to other matters he shall look to the common law. The court in which the prosecuting attorney is directed to file his information, is the district court of the territory, which was the court of general

common law and chancery jurisdiction, and not the probate court of the territory, which was a court of limited jurisdiction, and in which the proceedings shown in the case at bar were had. No such proceeding as is required by the statute of the territory was ever brought to escheat the lands involved in this case. Furthermore no legal proceeding of any kind to quiet title or procure title for the defendant were ever brought by it or any public officer for it which might possibly have been construed to have been a substitute for an escheat proceeding. Therefore the land in question was never escheated as a matter of law.

For the foregoing five reasons which we have stated under the sub-headings A. B. C. D. and E., we insist that the land in question in this case was never escheated, and neither the defendant in the case at bar, nor its predecessor, the territorial county of King, ever acquired any right, title or interest by escheat.

III.

THE PROCEEDINGS IN THE TERRITORIAL PROBATE COURT WERE IN LEGAL EFFECT AN ABSOLUTE NULLITY.

The Probate Court of the Territorial King County had no jurisdiction whatever over matters of escheat, and if it had had, the proceedings shown in this record were jurisdictionally defective; for the following reasons:

A. The Organic Law did not grant such jurisdiction to the Probate Court.

B. The Organic Law forbade any Territorial Court from interfering with the primary disposal of the soil.

C. The Territorial Act which assumed to give the Probate Court jurisdiction of escheats was invalid under the Organic Act, because of insufficient title.

D. The Territorial Act defining the jurisdiction of the Probate Court did not cover escheats.

E. The proceedings which were had, were under the Territorial law insufficient to give jurisdiction.

F. The proceedings which were had in the Territorial Probate Court were not due process of law.

A., B. and C.

These same three grounds were above given as reasons why the legislative branch of the territorial government could not pass any law escheating lands to the territorial counties. It follows as a necessary corollary that if the legislative branch of the government could not enact any laws upon a subject matter, that the judicial branch of the government could not possibly have any power over the subject matter of construing such laws. Therefore the territorial Probate Court of King County had no jurisdiction over the matter of the escheat of lands to the territory or its counties.

D.

The judicial power of the territory of Washington was by act of Congress (Sec. 1907 Rev. Stat. of U. S. 1874) vested in a Supreme Court, District Courts, Probate Courts and in Justices of the Peace. The Organic Act of the territory in Sec. 9 (Session Laws 1854, p. 36) provides as follows:

"The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law;" "and the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction."

The probate courts are not otherwise mentioned in the Organic Act. It will thus be seen that the district court was the court of general common law and chancery jurisdiction, and that the probate court was a court of limited jurisdiction, as its name alone would imply. The legislature in the probate act of the territory to which we have above referred, defined the jurisdiction of the probate court. The provision on this subject is found in Sec. 3, chap. 1, of the Probate Act (Sess. Laws 1859, pp. 165-237. and is in the following language:

"Sec. 3. That the probate court shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same: the appointment and displacing guardians of orphan minors, and of persons of unsound mind, and the binding of apprentices: in the settle-

ment and allowance of accounts of executors, administrators and guardians; to hear and determine all disputes and controversies respecting wills, the right of executorship, administration and guardianship, or relative to the duties and accounts of executors, administrators and guardians; and to hear and determine all disputes and controversies between masters and their apprentices; to allow and respect claims, against estates of deceased persons as hereinafter provided; to award process, and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators or guardians, or otherwise, shall be entrusted with, or in any wise accountable for any lands, tenements, goods or chattels, belonging to any minor, orphan, or person of unsound mind, or estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction."

If these provisions be examined with a miscroscope, it would not be possible to find a single microbe of jurisdiction over escheats. Besides not only the District Court, which was the Court of general common law and chancery jurisdiction, would on that account have jurisdiction over escheat proceedings, but also a statute of the territory which we have above set out in full, and which is found in Section 480, Chapter 52, Session Laws 1854, p. 218, expressly provided that such proceedings should be brought by information filed by the prosecuting attorney in the District Court. Therefore under the written law of the territory, if any of its courts did have jurisdiction over escheat matters, it would not be the Probate Court which assumed to escheat the prop-

erty involved in the case at bar. The proceeding in the Probate Court was *coram non judice.*

As we have above shown, citing authorities, the county in claiming escheated property, would not be claiming through or under the decedent. The title of the heirs of Lars Torgerson would be traceable through a chain of conveyances from the United States, and the claim of the County would be that it was the successor to the United States as to the reversionary right of escheat. So these two claims would be distinct and disconnected, though tracing from the same source. That a Probate Court has not got jurisdiction to settle any claims to property made by persons not claiming by, through or under the decedent, seems so self-evident that it ought not to require the citation of authorities. However we refer the court to a few, in the first of which the court was construing the powers of this same territorial probate court of Washington.

"While it is true that the probate court has jurisdiction to determine the claims to property as between those interested in the estate, this authority only goes to the extent of determining their relative interests as derived from the estate, and not to an interest claimed adversely thereto."

Stewart vs. Lohr, 1 Wash. 341- 343.

"The powers of the Superior Court in respect to its probate jurisdiction are the same as they would be if it were in fact a separate probate court. Proceedings in probate matters, in actions in equity, and at common law are distinct, and should not be intermingled except in cases specially authorized by law. Regarding the

Jurisdiction of probate courts, Judge Works, in his valuable work on the Jurisdiction of Courts (at pages 432, 433), says:

" 'And where probate jurisdiction is vested in courts of general jurisdiction, it is usually held that proceedings in probate must be treated as distinct from its law and equity jurisdiction, and as if it were a separate and distinct court of probate.' "

In re Alfstad's Estate, 27 Wash., p. 176-182.

"It is next argued that the probate court had no power in this proceeding to determine the title of third parties claiming the fund in question. This court held in *Stewart vs. Lohr,* 1 Wash. 341 (25 Pac 547. 22 Am. St. Rep. 150) that the probate court is without jurisdiction to try the title to property as between the representatives of an estate and strangers thereto. See, also *Huston vs. Becker,* 15 Wash. 586 (47 Pac. 10), and In re Alfstad's Estate, 27 Wash. 175, (67 Pac. 593.) Under these decisions the superior court sitting in probate had no jurisdiction to determine the title of third parties claiming the fund."

In Re Belt's Estate, 29 Wash., p. 535-540.

"We see nothing in the allegations of the parties, nor in the evidence adduced, which could enable the court of probates to take cognizance of the case. That court is the proper one to make a partition of a succession, where the parties claim as heirs or legatees; and no defence is made under another title, or in a different capacity. In the present case, if the minor heirs had wished to make a division of effects which they held in common, they would have been before the proper tribunal; but the object is to recover from a party who claims adversely to them and to their ancestor, and the ordinary courts can alone settle that question."

Harris' Tutor vs. McKee, 4 Mart. (N. S.) 485 (La.)

It will thus be seen that the proceedings of the Probate Court of the territory which appear in this record assuming to escheat the property in question were an absolute nullity because the Court was without jurisdiction.

E.

Admitting argumentatively, that the territorial probate court had the power in the course of probate proceedings, to enter a final order escheating property of the decedent, still in the case at bar, the whole of the probate proceedings would be null and void, because under the law of the territory as it was then framed, the probate court did not acquire jurisdiction over the estate of John Thompson at the beginning of the probate proceedings, and so all subsequent proceedings were null and void. We assume that it will be conceded that the territorial probate court was a court of limited jurisdiction; that all proceedings of a court of limited jurisdiction must show the facts necessary to its jurisdiction upon the face of its records or its proceedings will be void, and that when a statutory method of procedure is provided it must be followed, or such proceedings will be void. Decisions in support of these propositions could be cited from every state in the Union, and though the decisions in most cases are constructions of the specific written law of the respective states, still they are unanimous in enunciating these principles.

The petition for letters of administration and the order appointing the administrator in the case at bar,

are so deficient that the whole proceedings based upon the same are null and void, the court never having obtained jurisdiction over the estate of John Thompson, alias Lars Torgerson.

Section 90 of the Probate Practice Act of the Territory (Sess. Laws 1859, p. 182) prescribing the method of obtaining letters of administration, states the requirements of the petition in the following language:

"Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the probate court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will."

In reference to these jurisdictional requirements, two questions arise, namely, the venue of the administration and the person entitled to take out administration.

In regard to the first, the law of the territory (Sess. Laws 1859, p. 173) was as follows:

"Sec. 43. Wills shall be proved and letters testamentary or of administration shall be granted.

1st. In the county of which the deceased was a resident, or had his place of abode at the time of his death.

2d. In the county in which he may have died, leaving estate therein, and not being a resident of the territory.

3d. In the county in which any part of his estate may be, he having died out of the territory, and not having been a resident thereof at the time of his death.

Sec. 44. When the estate of the deceased is in more than one county, he having died out of the territory, and not having been a resident thereof at the time of his death, the probate court of that county in which application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate."

In regard to the second, the law of the territory (Sess. Laws 1859, p. 181) was as follows:

"Sec. 89. Administration of the estate of a person dying intestate, shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the order:

1st. The surviving husband, or wife, or such person as he or she may request to have appointed.

2d. The children.

3d. The father or mother.

4th. The brothers.

5th. The sisters.

6th. The grand children.

7th. Any other of the next of kin, entitled to share in the distribution of the estate. Provided, That nothing hereinbefore mentioned shall be so construed as to prevent the judge of probate from appointing any disinterested and competent person or persons to administer such estate, when requested so to do, by petition of any person or persons interested in a just administration thereof."

The only petition for letters of administration filed in the Thompson estate was as follows:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

Dated March 11, 1865. H. L. YESLER,
J. WILLIAMSON."

This is simply a letter from two citizens, Yesler and Williamson, who are not shown to have the slightest interest in the estate or to be entitled to administration, addressed to the probate court and asking the appointment of Daniel Bagley, another total stranger as administrator of the estate of John Thompson. We need not compare this with the statute above cited, for the court can see at a glance that it does not state a single jurisdictional fact showing that the court had jurisdiction to administer the estate of Thompson.

The only order appointing Bagley administrator was as follows:

"Whereas, John Thompson, of the county aforesaid, on the —— day of March, 1865, died intestate, leaving at the time of his death property subject to administration,

Now, therefore, know all men by these presents, that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

Dated March 26, 1865. THOMAS MERCER,
Probate Judge."

This order does not show the necessary jurisdictional facts any more than does the petition upon which it is based; though even if it did, all proceedings would be void if the petition was defective. We shall not over-

whelm the court with citations, but refer to the cases in the notes to that portion of the text of Cyc. found in Vol. 18, p. 122, which is as follows:

"The usual and regular method of applying for administration is by a petition or bill asking the appointment of the petitioner, or in some cases of some other person; and it has been held that an administrator can be appointed only when a proper petition is filed for that purpose. Jurisdiction to appoint should appear affirmatively on the face of the petition and the necessary facts should be alleged, such as death, last residence of decedent, the existence and *situs* if need be of assets, intestacy, where this is relied on, the right of the person who seeks administration, as next of kin, creditor, or otherwise, to be appointed, and, it has been held, the fact that he is qualified for the office."

The probate proceedings shown in this record are absolutely void upon their face, because of the manner in which it was attempted to conduct them, irrespective of the question of whether the court had jurisdiction of the subject matter. The proposed administration was conducted contrary to law in its initial step, and so all subsequent proceedings are necessarily void, and the court never acquired any jurisdiction either over the *rem*, the estate of Thompson, nor constructively over his heirs.

F.

By the so-called decree of distribution entered by the territorial probate court, it was attempted to divest the heirs of John Thompson, alias Lars Torgerson, of the title of their ancestor to the land in question. We insist that this proceeding is not "due process of law"

as that phrase is understood in American Constitutional Law. The Fifth Amendment to the Constitution of the United States ratified December 15, 1791, *inter alia* provided "No person shall be" * * * "deprived of life, liberty or property without due process of law." This, of course, was an inhibition laid upon the national government which came into existence under that Constitution. Later in 1868, by the Fourteenth Amendment this inhibition was likewise laid upon the state governments. Of course it is the first inhibition that concerns us, since the probate proceedings in question took place during territorial days, though most of the decisions construing this phrase "due process of law" have been decided under the Fourteenth Amendment. There have been many definitions of this phrase enunciated by the courts of last resort, and we respectfully refer the court for them, to Vol. 8 of Cyc. p. 1080.

The essential elements which we, in this case, invoke, are, that there must be an opportunity to be heard, or to use the more common expression, the party must have his "day in court"; that some notice, actual or constructive, must be given to the party interested; and that the proceedings taken shall be instituted and conducted according to the prescribed forms and solemnities for determining the title of property which are in vogue within the territorial jurisdiction for which the court is acting.

In a few words, we now wish to call the Court's attention to the nature of this proceeding in the territorial probate court.

It began March 26, 1865, by the filing in court of a letter addressed to the court by two ordinary individuals in no manner shown to be connected with John Thompson, requesting the appointment of another uninterested party to be administrator of Thompson's estate. On the same day the court rendered an order appointing the person so requested, to be administrator. Neither of these documents had any of the legal elements of a petition for letters of administration, or of an order appointing an administrator, as we have above shown. The estate seems to have lain idle for about three years, and then the Commissioners of the territorial county of King began to interfere by coming into court and asking to have the affairs of the estate closed up, and the property turned over to the County as escheated property. Nothing however, was done by the Court until after the administrator on February 12, 1869, filed a petition in which he asked to have the estate closed, and his accounts approved, and the property turned over to the County. And now on March 29, 1869, the court for the first time acted. Up to this time the proceedings appear to have been a defective attempt to administer a decedent's estate in the course of which the County had come in and claimed the property of the estate as escheated, and the administrator, by the petition which he filed, seems to have admitted that fact. The proceeding to this date has not a single element or form of an escheat proceeding. Nothing done by the court or by any of the parties, had given the proceeding the slightest resemblance to an escheat proceeding. And now the

court, in pursuance of the administrator's petition, entered an order which was published once a week for four weeks in a newspaper. This order and its publication, was the only thing in the whole of the proceeding which in the slightest degree resembled process, and it was addressed to "all persons interested in the estate of the said John Thompson, deceased," and they were ordered to appear "to show cause why an order of distribution should not be made of the residue of said estate *among the heirs of the deceased according to law.*" Not one word that there was any intention on the part of the court to attempt to escheat the property. Upon the return day of this process, the matter was continued and when taken up at the end of the continuance, the estate was closed up and the land was declared escheated.

Looking at this final decree of distribution, we find that it recites, that the administrator appeared in person, but no one else; that the usual steps in the administration of an estate, such as the inventory, appraisement, notice to creditors and the like, had all been taken; it recites there was presented to the court the documentary evidence showing these facts, and that the administrator was examined under oath; there is no hearing of any kind as to the existence of heirs recited, but the court suddenly makes a finding that there are no heirs; then the court enters the usual orders approving what was done in the course of administration and discharging the administrator; then the court distributes the entire estate to the County of King in Washington territory; and then the court makes a statement as to

what composes the estate including the land in question in this case. Up until the entry of the final order, everything appears to have been an ordinary administration of an estate in the ordinary course of probate and the forms and procedure suited to such a proceeding were used, the notice which was published being published in pursuance of the terms of the statute requiring a notice to be published of the closing up of estates (Secs. 317-18-19, Sess. Laws 1863. p. 257.) It is true the county had filed some papers in court, saying it claimed the property was escheated and that the administrator in his final report also declared that to be his opinion, but the order which was published based upon such report, said nothing about escheat, and the court took no proceedings of any kind which showed that it was dealing with the matter of escheats until it suddenly entered this final decree of distribution, and then without anything on which to base such an act, it suddenly escheated the property. Thus it will be seen that the heirs of John Thompson never had their day in court in the matter of escheating the property of their ancestor. Without any pleadings or issues involving such a question being before the court; without evidence heard, the court unexpectedly and suddenly acts. This is not due process of law.

The second principle in reference to due process of law, is that there must be some kind of process, actual or substituted, served upon the party whose rights are to be affected or divested. The only proceeding in this estate which even bears a semblance to process is the

order of the final closing of the estate which was published once a week for four weeks, and this notice expressly ordered the parties to appear for the purpose of having the estate distributed among the heirs of Thompson. There was therefore no process of any kind on which this order of escheat was predicated, and so there was not due process of law.

At the time these probate proceedings were had, there was on the statute books of the territory of Washington, a statute providing a procedure for escheating property. We have cited it before in full, and it is found in Sec. 480, Chap. 52, Sess. Laws 1854, p. 218. It is thereby provided that any suit to escheat property shall be brought by the prosecuting attorney by information in the district court, and that "like proceedings and judgment shall be as in a civil action for the recovery of property." Turning to the Civil Practice Act of the territory in Sec. 22, Chap. 3, Sess. Laws 1859, p. 9, we find provision made as to how parties shall be brought before the court by constructive service by publication. Such portion of that section as applies to the case at bar is in the following language:

"In case personal service cannot be had, by reason of the absence of the defendant, and the defendant is a proper party to an action where actual personal notice is not required by law, or is a proper party to an action relating to real estate in the district, it shall be proper to publish the notice, with a brief statement of the object and prayer of the petition or complaint, in some weekly newspaper published in this territory, or in Portland, Oregon; which notice shall be published not less

than once a week for three months prior to the commencement of the term of the court when such cause shall be heard."

This statute not only applies to civil actions in general, and thus is included in the reference to civil procedure made in the other act, but by its own terms it particularly applies to any action which might be brought to divest parties of title to real estate, because it says, that this method of service shall be used whenever the defendant cannot be actually served, or whenever the defendant is a proper party to an action relating to real estate. It will thus be seen that there was in the laws of the territory, a complete method of procedure prescribed for bringing escheat proceedings, and incidentally thereto bringing parties interested before the court by constructive process. Had there been any attempt to conform to this method of procedure and the jurisdictional portions of the law complied with, the proceeding would have been due process of law. But when this probate court of limited jurisdiction assumed to confiscate the property of the decedent, and transfer it to some one besides his heirs, the proceedings were not instituted and conducted according to the prescribed forms and solemnities for determining the title of property which were in vogue within the territorial jurisdiction for which the court was acting, and therefore were not due process of law.

For the six reasons above given, we claim that the proceedings in the territorial probate court were in legal effect an absolute nullity, and constituted no judgment.

decree or adjudication upon which any rights could be based. It was simply a void judgment, and it is not out of place for us in this connection to cite to the court the language of Freeman in his work on Judgments (4th Ed., Section 117) where he says:

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void." * * * "If it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third person, no power residing in any legislature or other department of the government, can invest it with any of the elements of power or of vitality."

IV.

THE STATUTE OF LIMITATIONS DOES NOT APPLY BECAUSE THE POSSESSION OF THE DEFENDANT IS NOT ADVERSE.

The control and possession of the county over the land in question in this case as shown on this record began by the county's having had the property stricken from the treasurer's rolls for purposes of taxation after the order of the probate court giving the same to the county, was entered, which was in 1869. The county did not make any specific use of this property for 16 years, and then in 1885, it occupied a portion known as the King County Farm, and began letting the same out to tenants for the purpose of producing a monetary in-

come. In 1892, it platted a portion of the land under the name of "King County Addition to Seattle," and began selling off lots. In 1900, it began using a portion of the property for county hospital purposes. In 1903, it platted the remainder of the property, calling it "King County Second Addition to Seattle" and began selling off lots.

Under this state of facts we insist that the county *could not,* and *did not* have adverse possession as against the heirs of Lars Torgerson, alias John Thompson.

It *could not* have adverse possession against the heirs, because:

A. All possessory acts of the county infringed the constitutional inhibition against taking private property for public use without just compensation.

B. All possessory acts of the county were *ultra vires.*

It *did not* have adverse possession against the heirs because:

C. The possession taken by the county recognized the title of the heirs.

D. The possession of the county was not under claim of right nor color of title.

A.

We believe we have above shown conclusively that

the property in question never escheated to the territorial County of King, and also that the probate proceedings assuming to give the property to the county, were an absolute nullity. The demurrer admits that the county has absolutely no paper title unless it be the order of the probate court. So this leaves the county with no title except the one which it may derive from the mere fact of possesssion under the accompanying circumstances as they are shown in the complaint in this case.

Our first contention in this connection is that the county had no power to appropriate to itself the private property of individuals, unless it were either by purchase or condemnation, accompanied with a rendering to the person whose property is taken, a just compensation therefor. All functions of the county are governmental and are acts of the government performed through the county. The government to which the territorial county was subservient as the sovereign power was the United States, and all acts of the county were the acts of the United States. The Fifth Amendment to the United States Constitution contains this inhibition as to the taking of private property.

In support of our position that the acts of a *quasi*-municipality like the county, are those of the government, we refer the court to the language used in the case of *Madden vs. Lancaster County*, 65 Fed. 188-191 where it is said:

"Cities and municipal bodies, that voluntarily ac-

cept charters from the state to govern themselves, and to manage their own local affairs, are municipal corporations proper." * * * "Counties, townships, school districts, and road districts are not municipal corporations proper." * * * "The latter, even when invested with corporate capacity and the power of taxation, are but quasi corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state."

In support of our position that the appropriation of property to its own purposes by a county is a violation of the inhibition contained in the United States Constitution, we refer the court to the opinion of one of the greatest lawyers the United States has ever produced, the author of the Commentaries on American Law, and who held the positions consecutively of Chief Justice and Chancellor of New York State, James Kent.

In the case of *Jackson vs. Cory*, 8 Johns. 385-388, the facts were that in 1791, a certain tract of land was granted to "The People of Otsego County," and the next year, in 1792, the county promptly erected upon the land a court house and jail. They held possession of such property for 15 years, until 1806, when under an act of the New York legislature authorizing the county to sell the property, it was deeded to the defendant in the suit, and he held possession some four or five years before the action was brought. The plaintiff claimed under the original grantor to "The People

of Otsego County," and insisted that the deed to "The People of Otsego County" was void because the county could not take as grantee under such description. The court held this deed void upon its face. The defendant also claimed that he got a good title from the county, because the county in 1806, had been authorized to sell the land. In this connection Chief Justice Kent said:

"Nor can the Act of 1806, authorizing the supervisors to sell the premises, be construed to divest the lessors of the plaintiff of their right. It is not to be presumed that the legislature intended to authorize the supervisors to convey anything more than the right and title which they might have had in the lot. The act was, no doubt, passed under the impression that the supervisors had a legal conveyance for the premises; and from the principles contained in the case of *Jackson vs. Catlin* (2 Johns. Rep. 248), and which has since been affirmed in the court for the Correction of Errors, conveyances by statute are not to be construed to pass any other or different right than that which the party before possessed. To take away private property by public authority, even for public uses, without making a just compensation, is against the fundamental principles of free government; and this limitation of power is to be found, as an express provision, in the Constitution of the United States."

When the county took possession and control of this land under what we can admit was an honest but a mistaken impression that the land had escheated to it, that act and every act which has been done by it or its officers or agents ever since, in continuing that possession, has been in contravention to the inhibition contained in the United States Constitution against the tak-

ing of private property for public use without just compensation; and consequently every such act has been null, void and of no legal effect, and could have no legal vitality which would enable it to constitute the basis of a possessory title.

Such acts and all possession predicated thereon, could not be adverse to the Thompson heirs, because they were forbidden by law.

When possession or control of land is taken, the circumstances existing at that time give character to the possession and such possession does not change unless there is a complete disseisin of the premises, and the taking of a new possession separate and distinct from the original one. All acts done by the present defendant in continuing the possession which it received from the territorial county, are as much in contravention to the constitutional inhibition, as were the acts of its predecessor. Moreover, the defendant being a county of the state of Washington, its acts since the organization of the state have also been in direct contravention of a like inhibition contained in the state constitution.

B.

Upon the same principle which we have invoked in the application of the constitutional inhibition, claiming that the acts in contravention thereof are null and void, and therefore cannot be made the basis for property rights, we, likewise, invoke the doctrine of *ultra vires*.

The right to take possession of lands as did the county in the case at bar for the mere purpose of owning them, and having at the time no use for them for any county purpose, was wholly unauthorized by law and out of such possession no possessory title could arise, nor could such illegal and improper possession be held to be adverse to the real owner so as to enable the defendant illegally in possession of the property to set up such possession under the bar of the statute of limitations.

This position for which we contend is clearly laid down in the case of *Williams vs. Lash,* 8 Minn. 441-446, in the following language:

"A county is a body politic, having a corporate capacity only for particular, specified ends and purposes, and is termed by legal writers a quasi corporation, that is having corporate attributes sub modo. 2 Kent Com. 314. And the same author states, that the modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. (2 Kent Com. 350.) This principle has been established and affirmed by numerous and uniform decisions in the United States and state courts, so that at this day it stands unquestioned, and the only difficulty that can arise with regard to it is to determine its applicability to the particular case in hand.

And, first, as to the powers of counties as expressly granted, defined and limited by statute at the time of the purchase of this real estate by the county of Ramsey, February 19, 1858. Sec. 251, Comp. Stat. 109, provides that 'each county shall continue to be a body politic and corporate for the following purposes, to-wit: To sue and be sued; to purchase and hold for the public use of the county lands lying within its own lim-

its, and any personal estate; to make all necessary contracts; and to do all other necessary acts in relation to the property and concerns of the county.' Some other provisions with regard to the power of county commissioners, having no bearing upon the question under discussion, need not here be cited.

It is to this enumeration of the powers of counties that we must look for the authority claimed by the county, or on its behalf, to purchase the lands in question. The second paragraph is the only one conferring express power upon the county to purchase and hold real estate. That limits the power of the county to the purchase of such lands only, as are for the public use of the county, and lying within its own limits. It will be observed by reference to the act of February 28, 1850 (Sess. Laws 1860, p. 131) that an additional grant of power was made, authorizing the county to purchase lands sold for taxes. The 'public use' by the county, mentioned in the statute, must mean that actual use, occupation and possession of real estate, rendered necessary for the proper discharge of the administrative or other functions of the county, through its appropriate officers."

The powers of the territorial county of King are almost identical with those in the case last cited. They are found in the Act in Relation to Counties, passed in 1854 (Sess. Laws 1854, p. 329) and are as follows:

Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That the several counties in this territory shall have capacity as bodies corporate, to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts and to purchase and hold such personal property as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county."

It was not within the power of the county in 1869 to take possession of this land, and having done so improperly and illegally, its act is null and void and of no legal effect, and no property rights can be predicated upon it.

C.

We have, as we believe, above demonstrated that the proceedings of the territorial probate court were a legal nullity, and upon them could be based no rights of any kind; but as written documents, they have an evidential value in so far as they show what was done. A plain and simple receipt for money creates no contractual obligation, but it is evidence of the highest character of the fact which it states, namely, that one person paid to another money. Had the county commissioners at the time the Thompson estate was closed in 1869 set up upon the county farm a monument on which was engraved the circumstances under which the county assumed to take possession of the land, and what its claims in that respect were, such monument with its inscriptions would be the very highest class of evidence to prove the facts which were stated. And thus, although no monument has been erected, the county commissioners of that day and their attorney went before the probate court of the territory and there did certain things and spread upon its records certain documents and papers and procured the probate judge to spread upon its records under the guise of orders and decrees, certain statements of facts which have thus been carefully preserved for

our use in the public archives, and although the things they did, and the things they said, and the things they procured the judge to say, had no vitality or force as judicial proceedings, still they are proper evidence of the highest type to prove what the county officials did, and what they said as evidencing the circumstances under which they took possession of the land in question, and thus give character to that possession.

Looking once more at the proceedings in the territorial probate court, we find that they were begun in March, 1865, immediately after Thompson's death. On May 26, 1868, a little more than three years later, the county commissioners of King county appear upon the scene with a sworn petition in which they state that they believe there is a large sum of money in the hands of the administrator, and no heirs have appeared to claim the same; that King county is entitled to the balance in the administrator's hands, and praying for an accounting and payment of the balance to the treasurer of King county. Here at the outset the county claims what is in the administrator's hands, because there are no heirs, thereby impliedly admitting that if there were heirs their title would be better than that of the county.

On the day last mentioned, the court issued a citation commanding the administrator to appear, in which citation it is recited that the county commissioners desired to have the residue of the estate paid over to the county.

On July 27, 1868, the administrator filed an an-

swer to said citation, and in it stated that a certain Mr. Wold, in behalf of the countrymen of John Thompson, had requested to have the matter held up to ascertain the whereabouts of the heirs of Thompson, as such countrymen of his were well assured that heirs were living in Sweden; and the administrator asked to have the matter go over until another term of court, and if no word was then had of the heirs he would turn over the property and effects to King County.

So that in response to the citation which they had procured, the county commissioners were informed that Thompson's countrymen thought they could find his heirs. This request was reasonable, as all parties knew that if they could be found the heirs had the better title, and so the matter went off until the fall of that year.

On October 29, 1868, John J. McGilvra filed an affidavit in the Court in which he stated he had been hired by the county commissioners to place the estate of John Thompson in such a position that the county, "to whom said estate by law escheats," may have the full benefit thereof. He then proceeds to make excuses for not having attended to the matter before, and asks for certain relief, referring to other matters. On February 10, 1869, the county filed its petition to have the administrator removed, giving seven different reasons therefor, four of which were in reference to his improper management of the real property of the decedent. Here the county once more shows that it is taking an active interest in this estate and is expecting to obtain the same in case no heirs are found.

On February 12, 1869, the administrator filed a petition to have the estate finally disposed of in the course of which he states "that no heirs at law of the said John Thompson have been found after diligent search and effort," and prays that he may be allowed to turn the residue of the estate over to King county. In pursuance of this petition, the court entered an order for all parties interested to show cause in connection with the settlement of the estate, and this order was published for four weeks in a newspaper. As we have before stated, this order said nothing about escheat, but said that the estate was "to be divided among the heirs of said deceased according to law."

On May 26, 1869, the final decree discharging the administrator and assuming to distribute the estate was entered. In this decree it is recited that Thompson died intestate, leaving no heirs surviving him, and also "there being no heirs of said decedent, that the entire estate escheat to the county of King in Washington territory." Such decree then proceeds to adjudicate that the whole estate of Thompson "be and the same is hereby distributed as follows, to-wit: The entire estate to the county of King in Washington territory." Then follows a portion of the decree approving the acts of the administrator and discharging him. Then follows a description of what composes the residue of the estate, which is referred to in the decree, and it mentions (1) certain cash, (2) the real estate in question in this case, and (3) a claim for rents reserved under a lease.

It will thus be seen that the county claimed this property because it believed that the same escheated, and that it was entitled to escheated property. This fact that such was its claim is shown clearly and explicitly in the documents which the county commissioners and also which their attorney have spread upon these court records, and it is also shown clearly in these orders and decrees which were spread upon these court records by the judge at the instigation of the county and its attorney. Promptly upon the entry of this supposed decree of escheat, the county exercised its control over this property by having the same marked as exempt from taxation upon the treasurer's rolls, and 16 years afterwards took actual physical possession of the property, and began letting it out to tenants for monetary profit. What uses may have been made of it since by the territorial county, or the defendant, which was its successor, cannot matter. The territorial county of King took possession of this property under circumstances where it admitted that the title of the heirs of John Thompson was better than its title, if there were such heirs, and the presumption of heirship never having been legally destroyed by proper escheat proceedings, the possession of the county has never become adverse. It plainly appears from these facts that the county never claimed any title or right of its own traceable from any source whatever save the right of the sovereign to take escheated property, a condition precedent to the existence of which right would be the nonexistence of heirs, and it goes without saying that until

the non-existence of heirs is legally established by formal escheat proceedings, no sovereign can take a title which would be adverse to such heirs. That a taking of possession of land under circumstances which recognized that there is a superior title, cannot be an entry upon which can be based adverse possession as against that superior title, is clearly held in *Port Townsend vs. Sears,* 34 Wash. 413, where the Court says:

"To constitute an adverse possession there must be not only an ouster of the real owner followed by an actual, notorious and continuous possession on the part of the claimant during the statutory period, but there must have existed an intention on his part for a like period to claim in hostility to the title of the real owner. *Blake v. Shriver,* 27 Wash. 597.) Possession is not adverse 'if it be held under or subservient to a higher title.'" (*Bellingham Bay Land Co. v. Dibble,* 4 Wash. 764.)

Again in *McNaught-Collins Imp. Co. vs. May,* 52 Wash. 635, the Court says:

"It must be continuous and exclusive, of course, and under color of title or claim of right, in good faith; otherwise the claimant would simply be a common trespasser. This disseisin must necessarily and logically constitute the commencement of a new title working a change in the ownership of the land; the initiation of a title which will ripen into ownership, if persisted in and not interfered with by the true owner. The possession must be an independent possession, and not subservient to a superior right or title. Then, if at some particular time there must be a disseisin which starts the new title in the claimant, when does that time arise under the theory announced in *Johnson vs. Connor?* When the claimant settles upon the land, believing it to be government land, his possession is subser-

vient to the government. It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land. But in no sense could he be said to be holding possession adverse to the true owner at that time."

We take the liberty of analyzing the language of this case and applying it to the case at bar: "The possession must be an independent possession and not subservient to a superior right or title." In the case at bar the county's possession was not an independent possession. On the contrary, it was absolutely dependent upon the non-existence of heirs, and if heirs did exist the county had no title whatever. "When the claimant settles upon the land believing it to be government land his possession is subservient to the government." When the county settled upon the land believing it to belong to the Thompson heirs, if there were any, its possession was subservient to the title of such heirs. "It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land." It is true, by observing the rules and laws prescribed by the territory, the county might have claimed some rights under its possession when it took formal escheat proceedings to terminate the presumption of heirship. "There is no hostile possession adverse to the true owner at that time." In the case at bar, at the time the county took possession, it was not hostile or adverse to the heirs, for the county well knew that their title was the better, and as it was chargeable with knowledge of the

law, it knew that the title of the heirs could not cease until escheat proceedings had been taken.

The following cases also sustain this proposition, and we do not believe there can be found any to contravene it:

"To show conclusively that adverseness is universally regarded as a question of law, and not of fact, the books proceed to discuss the circumstances under which possession would be held to be adverse or otherwise; as, for instance, it is held that possession will not be adverse if it be held under or subservient to a higher title."

Bellingham Bay Land Co. v. Dibble, 4 Wash. 764-7.

"A possession in order to be adverse must be accompanied with a claim of the entire title. If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse to that title."

Jackson v. Johnson, 5 Cow. 74-92.

"It is repugnant and absurd to lay a demise in the names of persons as heirs of the person last seized, when the action is brought upon the assumption that the land escheated for want of such heirs."

Catham v. State, 2 Head. (Tenn.) 553.

"Assuming the truth of all that the answer contains, and construing all that is there asserted most favorably for the defendant, it comes far short of establishing a possession adverse to the true owner. To constitute such a possession there must be a claim of title and the claim must be of the entire title. It must be such as necessarily to exclude the idea of title in any other person. 'When a plaintiff has shown title, and

the defendant relies on possession, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests; and it must necessarily be exclusive of any other right. This doctrine has often been repeated. Let me ask what is meant by the *quo animo*. Is it an intent to take possession of another man's land, knowing it to be so, and make it his own by 20 years' possession? This will not be pretended. Such an entry would be a mere trespass, and the person so trespassing with no other pretense or color of title will always be a trespasser. The *animo*, then, or the intent with which the entry is made, must be bona fide an entry, believing, in good faith, that the land is his and he has the title.' (*Livingston v. The Peru Iron Co.*, 9 Wend. 511.) If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse. (*Smith v. Burtis*, 9 John. 180. See also *Jackson v. Johnson*, supra.)"

Howard v. Howard, 17 Barb. 663-667.

"To render possession adverse, so as to set the Statute of Limitations in motion, it must be accompanied with a claim of title; and this claim, when founded 'upon a written instrument as being a conveyance of the premises,' must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be 'exclusive of any other right'; and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession, under such circumstances, is not adverse."

McCracken v. City of San Francisco, 16 Cal. 591-637.

It seems to us that the fact that the county took possession of the land with full knowledge of the rights of the heirs and subject to those rights whatever they were, appears so clearly in this case that it is beyond dispute. That the possession so taken could not be adverse to the heirs seems also as a matter of law entirely beyond dispute.

D.

No possession is adverse in such a manner as to constitute a bar under the statute of limitations, unless the same is based either upon a claim of right or color of title, accompanied with an intention to oust or disseize the previous owner.

The county never had any intention to oust or disseize the heirs of John Thompson, because their taking possession was predicated upon the supposed fact that there were no such heirs. The county itself in the probate proceedings participated in declaring that there were no such persons, in fact based its claim upon their non-existence, and so could not as a physical possibility have intended to hold against them. There was certainly no intention to oust in this case.

The county did not have any claim of right to this property. It appears clearly and affirmatively just what was the claim of the county, and, such being the fact, no other basis of claim can be presumed or imagined. Its claim was that the title of John Thompson had ceased for lack of heirs, and that it being by law the

successor to the United States as sovereign in the matter of escheats, it took the title of the United States which accrued by reversion. If, then, as a matter of law, no reversion took place, and the title of John Thompson did not cease, then the county had no claim of right whatever. The county is a municipal corporation or artificial person and cannot actually think. Its thoughts are only such things as can be inferred from the acts of its officers and agents when they are given their proper legal effect under the law, and only such claims as it has, can it think it has.

One of the heirs of John Thompson, representing himself and the claims of the other heirs, is here demanding the property, and as the only right the county ever claimed was a right to the property if there were no such heirs, it cannot now assert against them some claim that it did not make at the time it took possession of the land.

The county has not got color of title. All documentary paper or record title of the county is negatived in this case unless the probate decree can be accounted as such. As we have above shown, for numerous reasons this probate decree is an absolute nullity for the purpose of creating legal rights or conveying any title to this land. But irrespective of how or why this decree may have been procured or come into existence, when we look at the document carefully it absolutely has none of the elements of color of title. It is not a conveyance. It does not purport to convey title; if so, whose title? Certainly not the title of the heirs

of John Thompson, for it says there are no such persons. Certainly not the title of John Thompson, because it distributes the property to the county upon the very ground that the title of John Thompson had ceased. It is not a decree of distribution, for such a decree could only give title to those claiming under the decedent. What is it, then? It is simply an awkward and illegal attempt of the probate court to convert the proceedings established by law for the distribution of an estate into an escheat proceeding. An escheat proceeding, if prosecuted to judgment, would not even then be color of title. The judgment of escheat would simply destroy the presumption of heirship, and the title would revert by operation of law, being founded upon the original title of the sovereign, and not upon any rights acquired under the escheat judgment. This improper attempt to escheat this property certainly cannot constitute color of title even if the court had not been without jurisdiction of the entire subject matter. Upon its face, this decree assuming to give this property to the county is a proceeding unknown to the law, and therefore cannot be color of title or constitute any other evidence of title.

In *Yesler Estate vs. Holmes,* 39 Wash. 34-36, the court says:

"On this subject the court, in substance, instructed the jury that, under our statute, the rightful owner of real property is seized of the same, whether he is in possession of it or not, and that disseizin can only occur where there is an adverse and hostile entry; that an entry to constitute an adverse or hostile entry must be

under a claim of right, made for the purpose of dispossessing the owner; and that an entry on the land of another, under a mistaken, though honest, belief that such lands are public lands and subject to entry, would not work a disseizin of the true owner." * * * "Under the rule of these cases, a mere naked possession is not sufficient to constitute adverse possession under the statute. Possession, to be adverse, must be actual, open, notorious, continuous, and under a claim of right or color of title."

In the above case the court says "That an entry on the lands of another under a mistaken, though honest, belief that such lands are public lands and subject to entry would not work a disseizin of the true owner." Escheated lands are public lands and they are subject to entry by the sovereign or its representative, though such entry cannot mature into a title until office found. So applying the language of this case to the case at bar, an entry upon the lands of the heirs under a mistaken though honest belief that such lands were escheated lands and subject to entry would not work a disseizin of the heirs.

As holding that the possession of land is not adverse unless there is an intention to oust the true owner, and a claim of right or color of title, we refer the court to the following cases:

"The uniform rule is that possession will not ripen into title unless such possession is exclusive, open, notorious, adverse, and under the above authorities, under a claim of right."

Wilcox v. Smith, 38 Wash. 585-590.

"Without especially reviewing all the cases cited by either the appellants or respondents, the overwhelming weight of authority seems to be that the basis of an adverse possession is a claim of title or right. An entry can only be made by the seizin of the claimant, or by an ouster of the owner of the freehold. There must be a disseizin before another can become legally possessed of the lands, and this, of course, can only be done by some act which works a disseizin of the original owner, for the seizin cannot abide in two claimants at the same time. And as the statute of limitations will not commence to run until this seizin, it becomes necessary to determine what acts will constitute a disseizin or dispossession of the original claimants. First, there must be an intention; that is, an entry for the purpose of dispossessing the owner. That intention, of course, must be determined by the acts of the usurper; and before the right of the owner could be extinguished, and his divestment established, and an investiture created for the usurper, there must, of necessity, be an adverse possession on the part of the new claimant. And while it is true that the statute provides that no action shall be maintained unless the plaintiff has been possessed within ten years, yet the question of whether or not the original owner is so disseized must of necessity, in a case like this, depend upon whether or not there has been an adverse possession of the defendants during the statutory period. For the disseizin can only occur where there is an adverse or hostile entry. This court has said in *Bellingham Bay Land Co. vs. Dibble,* 4 Wash. 764 (31 Pac. 30), that the entry must be under claim or color of title, or it would not ripen into title. And it was also said in *Balch vs. Smith,* 4 Wash. 497 (30 Pac. 648):

'In our opinion our statute of limitations is like that of most other states, one of adverse possession, and under it the rightful owner of real estate is seized of the same, whether or not he is in actual possession thereof, unless the same is in the actual adverse pos-

session of some other person. This being so, it follows that when ownership and seizin is once shown it will be presumed to have continued until such presumption is overcome by allegation and proof of adverse possession in someone else.' "

Blake v. Shriver, 27 Wash. 593-596.

"In this state possession of real property, to be adverse, must be actual, open, notorious, continuous, and under the claim of right, or color of title. Mere naked possession is not sufficient" * * *. This record does not disclose such a possession as the rule announced in these cases requires. While the possession shown has been sufficiently long, open, notorious, and continuous to ripen into title for at least a part of the land in dispute, it was not shown to have been either under a claim of right or color of title, and without one or the other of these essentials, possession, no matter how open and notorious, or how long continued, can never ripen into title.

Lohse vs. Burch, 42 Wash. 156-160-161.

For the foregoing four reasons, every one of which we believe to be well taken, we insist that the possession of the county was not adverse to the heirs of John Thompson, and therefore the protection of the statute of limitations cannot be invoked by the defendant.

V.

THE OPINION OF THE DISTRICT JUDGE.

We mean no disrespect in criticizing the opinion of the Judge who heard this case in the court below, but as that opinion appears in this record and is adverse to our client, our duty compels us so to do. Particularly is this the case because it passed upon several ques-

tions which arose in the court below, and which we feel certain will again be raised by counsel in this court, and so we might as well meet them now.

First: The District Judge held in this case that the county obtained a good title to the land in question under the proceedings of the territorial probate court, and therefore declared that it was unnecessary for him to pass upon the other questions involved. In order to reach the conclusion that he did, it was necessary for him to hold that escheated property would pass to the territory or its counties, and not to the United States. His reasoning is entirely based upon this principle, and if he is mistaken in this respect, the whole of his reasoning and logic fails. In fact this is a most important question in this case, because if this court finds that we are right in that escheated property passed to the United States in the territory of Washington, that one point is absolutely decisive of this case, without taking into consideration all the other good and valid reasons that we have given. This is so because if the county was not entitled to escheated property, all the court proceedings shown in this case are an absolute nullity, and also the county is without any claim of right or color of title on which to base an invocation of the statute of limitations. The importance of this question is our justification for the rather lengthy analysis of a certain case in which we are about to indulge. As above shown in our brief, the Supreme Court of the United States (*Church of Jesus Christ of Latter Day Saints vs. United States,* 136 U. S. 1), the Supreme Court

of Tennessee (*Williams vs. Wilson,* Martin & Yerger, 248), the Supreme Court of Alabama (*Etheridge vs. Doe,* 18 Ala. 565), the Supreme Court of Montana (*Territory vs. Lee,* 2 Mont. 124), and the Supreme Court of Iowa (*King vs. Ware,* 4 N. W. 858), have all clearly and specifically held that property which escheats in a territory of the United States, passes to the United States government. The trial judge seeks to cast reflections upon these cases by picking flaws in them, but that question we will take up later. He has selected the decision of the Supreme Court of Michigan in *Crane vs. Reeder,* 21 Mich. 24, on which to base his opinion, because in it are found sentences and remarks which would seem to militate against the position for which we contend, and also because the case finally holds that escheats which occurred in the territory composing the state of Michigan before that state existed became subsequently the property of the state. We mean no disrespect when we say that the trial judge did not read this case understandingly. What it decides is good law, but it has no more application to the law of the territory of Washington than it has to the law of our Philippine Island possessions. In treating of the subject of escheat there arises the question of sovereignty. Under our system of government there is in reality no sovereign (*Chisholm vs. Georgia,* 2 Dallas, 419), but this system which we have inherited from our ancestors is of such a nature that certain functions of government which were formerly exercised by the sovereign and certain property rights which formerly belonged to the sovereign must

be vested in some public authority. So the courts have by construction devolved such duties and rights upon that officer or branch of the government whose functions most nearly, under our system, resembled those of the British sovereign under the common law. The principles of international law in respect to sovereignty also frequently are involved in the case. As the different territories of the United States have been acquired in different manners, the method of their acquirement cuts a very important figure, and no one can judge of what is the proper construction to be put upon the law unless familiar with the history of the acquirement of such territory. There is no branch of the law in which the knowledge of the history of the subject matter under discussion is more essential than in the one we are now considering. In their opinions upon these questions the judges (they and counsel both being thoroughly posted) assume that those they are addressing have the historical knowledge referring to the subject matter, and so their opinions cannot be understood by one reading them unless he has that knowledge. It would not be expected that a judge in Georgia would have the historical knowledge in reference to the Lewis and Clarke Exploration and the achievements of Marcus Whitman, which a judge in Oregon or Washington would take judicial notice of. Nor would it be expected that a judge in Massachusetts would be familiar with the history of the conquest of California and so much of the Mexican law and the peace treaties as would affect titles in that state and be taken judicial notice of

by the courts. It therefore shows no disrespect on our part when we say that the trial judge did not understandingly read a decision referring to the territory of Virginia northwest of the Ohio river. We do not know where the judge studied law, but feel positive that it could not have been either in Ohio, Indiana, Illinois, Michigan or Wisconsin.

We will now state as succinctly as we can the history of the "Old Northwest Territory," and then when this Michigan case is read in the light of that history it will have an entirely different aspect than it would appear to have from disjointed extracts from the opinion. It will transpire that it not only is not inconsistent with our contention, but in principle, exactly coincides therewith.

The Colony of Virginia comprised that territory which is now the states of Virginia and West Virginia, and under its crown grants it claimed to be the owner of the territory northwest of the Ohio river extending to the Great Lakes and the Mississippi river. At the end of the Revolutionary War there was a dispute as to whether the United States or Great Britain was entitled to this region, both claiming it. During the first negotiations for peace nothing had been mentioned in reference to this subject, and so in the final settlement it was necessary to appeal to international law. It is a principle of international law that when a peace is concluded all debatable territory which has not been made the subject matter of express agreement belongs to that one of the belligerents who is in military possession

thereof at the time hostilities ceased. Not long before the close of the Revolutionary War, Gen. George Rogers Clarke, leading a body of American frontiersmen backed by Indian allies, had captured the military post at Kaskaskia (afterwards the capital of Illinois), on the Mississippi river, and then during the winter made a forced march across what is now the state of Illinois, and captured Fort St. Vincents (now Vincennes, Ind.), on the Wabash river. He was acting in the name of the State of Virginia. Fort St. Vincents was the leading military post in the Northwest Territory, and so at the conclusion of the Revolutionary War the flag of the State of Virginia was flying over that fort, and Great Britain was compelled to acknowledge that such territory was in the military possession of the United States. This incident is referred to in the Act of Cession of Virginia, when it provided "that a quantity not exceeding 150,000 acres of land, promised by this State, shall be allowed and granted to the then Colonel, now General George Rogers Clarke, and to the officers and soldiers of his regiment, who marched with him when the posts of Kaskaskies and St. Vincents were reduced." Of course under these circumstances the title of the state of Virginia to said Northwest Territory was beyond dispute as far as the other states of the then confederation were concerned. However, the state of Virginia magnanimously made a present of this territory to the Confederation by an act passed December 20, 1783, directing its delegates in Congress to deed the same to the United States. In pursuance of such directions, on March 1,

1784, Thomas Jefferson, James Monroe, S. Hardy and Arthur Lee, the Virginia delegates in the Continental Congress, made a deed of such territory to the Confederation. On July 13, 1787, one month before the United States Constitutional Convention met, and almost two years before the constitution went into effect, the Continental Congress enacted "An Ordinance for the government of the territory of the United States Northwest of the river Ohio."

(This Deed of Cession and Ordinance and all acts of Congress and of the State of Virginia in reference to this subject matter will be found in the beginning of either Hurd's Rev. Stat. of Ill. or Starr & Curtiss Ann. Stat. of Ill. following the Constitution of the U. S. and preceding the State Constitutions.)

From this Northwest Territory have been created the present states of Ohio (except a small portion of the northeast corner thereof, known as the Western Reserve of Connecticut), Indiana, Illinois, Michigan and Wisconsin.

In the case of *Crane vs. Reeder* which we are discussing, the Supreme Court of Michigan had before it the problem of ascertaining upon whom devolved the right of sovereignty in the Northwest Territory to such an extent and in such a manner that such person or government would take escheated property. The state of Virginia had completely parted with its title and control of the land to the Confederation composed of the states which were originally the 13 Colonies. This Con-

federation was not a sovereign power. In the articles creating it, it is styled a "Confederacy," and it is stated that "the said states hereby severally enter into a formal league of friendship with each other for their common defense," etc., and it was declared that "each state retains its sovereignty, freedom and independence." The relation existing between these states was simply an offensive and defensive alliance, by treaty between sovereign powers. Where, then, did the sovereign power lie? The Supreme Court of Michigan in the case under discussion correctly reasons this proposition out as follows:

"The articles of confederation made no provision for the direct legislation of Congress over the local affairs of any part of the country, and such direct government, while possibly it might have been lawful, would have been at variance with the whole theory of local government, which had been acted upon both by states and colonies. The delegation of legislative powers to the territories was practically a necessity, and the ordinance of 1787, while retaining a right of veto or disapproval of the acts of the governor and judges, provides expressly that such laws as are not disapproved shall only be repealed by the local authority. No one can read the ordinance without perceiving that it was intended to throw the whole regulation of local affairs upon the local government." "Immediately after the government of the United States was organized under the constitution, a brief statute was passed to adapt the ordinance to the constitution—not to change its nature—but, as stated in the preamble, in order that it *'may continue to have full effect.'* And so long as the system should continue, the whole local regulation was clearly delegated to the territory, as it was afterwards to Michigan when separately organized." "The creation of such a govern-

ment would be at least an equivalent to the erection of a county palatine, and would transfer all necessary sovereign prerogatives. But under this ordinance the territory only differed from a state in holding derivative instead of independent functions, and in being subject to such changes as congress might adopt."

The court then proceeded to analyze the ordinance of 1787, and point out that the law of descents therein provided varied from the common law and was in a number of respects defective; that the ordinance was silent on the question of escheats, and that the governor and judges who were the legislature of the district under the ordinance, would have full power to legislate upon this subject. They did legislate upon this subject in 1818, and again in 1827, giving the escheats to the territory. Then in 1836, congress ratified the constitution of the state of Michigan which provided that the state should succeed to the rights of the territory of Michigan in this respect. The exact language of the court in this regard is as follows:

"But in regard to escheats the ordinance was entirely silent, and the act passed October 1st, 1818, declaring that they should '*accrue to the territory,*' was not in conflict with the ordinance. The succession act April 12th, 1827, was in this respect identical. The act of congress of June 15, 1836, preliminary to the admission of the state into the Union, accepts, ratifies and confirms the constitution, and the constitution (schedule, section 3) provides that 'all fines, penalties, forfeitures and *escheats* accruing to the territory of Michigan, shall accrue to the use of the state.' We think the state of Michigan became thereby entitled to the premises in controversy."

It will thus be seen that this case of *Crane vs. Reeder* can be correctly summed up to hold that at the time of the organization of the Northwest Territory, the United States was not a sovereign government; that the territorial government created by the ordinance of 1787, was endowed with all the sovereign powers that existed, including the right to escheat property; that such territorial government legislated upon such rights; that when the state of Michigan was admitted into the Union, its constitution expressly provided that the state should succeed to all the rights of the territory of Michigan in reference to escheats; and that the congress of the United States approved and confirmed this state constitution. There is absolutely not the slightest resemblance between the Northwest Territory and the Territory of Washington. The Northwest Territory was a sovereign power before the United States was, and the Washington Territory was a mere municipality created by the United States.

The Supreme Court of the United States in *the Church of Jesus Christ of Latter Day Saints vs. United States,* 136 U. S. 1, clearly and unequivocally decides that all escheats in a territory revert to the United States. Among the Justices of that court at the time the last mentioned decision was rendered, were Chief Justice Fuller, of Illinois, and Associate Justice Brown, of this very state of Michigan, both of whom came from portions of this Northwest Territory, and were perfectly familiar with the history of its organization, and well knew what the courts had said in regard to the

same. In the opinion in that case, special attention is called to the fact that the Northwest territory differed from all the other territories of the United States as is evidenced by the following language:

"It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, *other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution)* is derived from the treaty-making power and the power to declare and carry on war."

In this connection the judge criticises the case of *Williams vs. Wilson,* 1 Tenn. p. 247, by stating that it does not appear from the case that there was any territorial government to which the property could escheat. This is a captious criticism. We will ask the court to take judicial notice that there was a territory of Tennessee. That was what the Tennessee court did, and did not suppose in its opinion it was necessary so to state. It does appear that North Carolina ceded the territory in question to the United States government after that sovereign power had come into existence and that the escheat occurred before the state of Tennessee came into existence. Whatever may have been the machinery by which the United States operated its government in that locality, the fact still remains that this case adjudicates that the United States government is a sovereign and that there is no other sovereign until a state government is formed.

Also the Court criticises the Mormon Church case (136 U. S. 1), by explaining that in that case an act

of congress explicitly declared that the property should be forfeited to the United States. There was such an act of congress and of course the Court gave it weight and followed its directions, but the power to forfeit the property was not derived from the statute. It could not have been. Such a statute if based upon no pre-existing authority, would be simply confiscation. The power of congress to pass the act was dependent upon its inherent right as sovereign to control escheated property, and say what should be done with the same. And that is just what the Supreme Court of the United States in that case holds, when (differing with the learned judge in the court below) it says: "It was not necessary to resort to the condition imposed by the Act of 1862" * * * "Congress, for good and sufficient reasons of its own, independent of that limitation, or of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence." The Supreme Court thus specifically declares that the right of the government to abolish the church corporation and escheat its property, is not based upon the act of congress which is referred to by the judge in his opinion in this case.

The criticism of the judge upon *Territory vs. Lee*, 2 Mont. 124, is to call attention to the fact that the property sought to be escheated was in the nature of easements. This again is a captious criticism, because it makes no difference whether the property forfeited is personal or real, and if real, it makes no difference what is the estate which is held in the realty. All are proper-

ty, and the law of escheat applies equally to all when the title of the owner thereof fails, and there is nobody who can take in succession to him.

Second: We have raised the question that the law of the territory in regard to the descent of realty was invalid, because the title of the Probate Practice Act was not broad enough to include this subject matter, there being in the Organic Law a provision that every law shall embrace but one object, and that shall be expressed in the title. To this contention of ours, there has not been and cannot be made any answer. The point is well taken, and the law of the subject is clear. The only defense made to this position by opposing counsel was to hold up *in terrorem* a wholesale destruction of titles to realty if the territorial law of descents was held invalid. The trial judge in his opinion takes this view. This kind of an argument *ab inexpedienti* is only to be resorted to in desperate cases. It impliedly acknowledges that what the man who uses it is contending for, is not the law, but that it should be held because it is the best thing for the general good. In other words, it is a direct request to a judicial officer to legislate. It is the growing use of this species of argument by the judiciary that has brought about the present agitation in reference to the recall of the judges. The people are reaching the conclusion that if the courts are not going to decide what the law is, but what it ought to be, then they can do that work themselves, if not better, at least more satisfactorily.

But let us see how extensive this threatened danger really is. This law of descent will be found in Chapter 14 of the Probate Practice Act of the Territory, Wash. Sess. Laws 1859-60. If it is held invalid, the common law will take its place. The only differences between this provision and the common law are, that if a person dies without issue, the father will inherit, if he survive, instead of the brothers and sisters. If there are no issue and no father, but one or more brothers or sisters living, and a mother, then the mother will take an equal share with the brothers and sisters. If there are no issue, and no father and no brother or sister living, the mother will take to the exclusion of any issue of deceased brothers or sisters. With these exceptions of the rights of the father and mother, the law is identical with the common law. Of course in the great majority of cases, an adult owning property will have issue and so it is only in the rare cases where a father or mother inherit, that any title would be affected by holding this law invalid. But even these cases are much lessened by the fact that if the father or mother died without having disposed of their interests, the descent would be cast in the same place that the common law would have cast it. So that the cases affected are now reduced to cases where the father or mother take the estate and then convey it away to strangers. This leaves but few titles where the question could be raised at all. But only ancient titles could be affected. In 1881, the laws of the territory were codified and reenacted as a whole, including this law of descents. (See

Code 1881, Chap. CCLV). To this codification the point we make cannot apply, and that law was valid in the territory since that time. Cases which come within the old statute prior to 1881 would all now be cured by the statute of limitations. The ten years statute of limitations creating a title by possession, has had an opportunity to run more than three times over. The seven years statute of limitations adopted in 1893, has had an opportunity to run for 19 years. Wherever the title had a chance to pass through judicial proceedings, so that the title was traced through a judicial deed, all right to attack the same expired one year after the so-called three years' statute of limitations was enacted in 1907. At a glance the court can see that instead of, as the trial judge says, one-half of the titles in the state being unsettled, there could not possibly be one title out of a hundred where the question could be raised, and not one out of a hundred of those in which it would not be cured by the statute of limitations, and that is not allowing for the practical protection to be derived from the fact that no person whose rights, if they had any, arose more than 31 years ago, would ever be likely to find out that they had any such rights. In a word, it could only apply to some phenomenal case like that at bar where the property had remained continuously in the same person's hands, and under such circumstances that that person did not hold adversely. It is well nigh impossible that any other case like this will ever arise in this state. Not one title in ten thousand could be affected, and it is not likely that any such ever

would be. Is this bogey so terrifying that, like frightened children, we should run and hide for protection behind the skirts of expediency?

Third: Counsel argued to the court below that because the probate court had power successively to pass upon the existence or non-existence of certain persons who would take under the decedent, it had a right to decide there was no one who could take under the decedent, and such decision would be binding on everybody. The trial judge took some stock in this argument, and in his opinion asks: "Why was it not equally competent for the probate court to determine there were no kindred and to escheat the property to the county?" This is a double question.

We will answer the first half by saying that the probate court had such power and could determine there were no kindred for the purpose of deciding that its jurisdiction had ceased, and there was nothing further for it to exercise its probate functions on, as it could not exercise the final act of administration by distributing the estate when there was no one to distribute it to.

The second half of the question we will answer by saying that the probate court could not act, because jurisdiction had ceased, and it could go no further, and the next step of escheating the property was entirely within the province of another court acting under a different method of procedure. Court and counsel both erroneously assume that the distributing of an estate

of a decedent, and the act of declaring an escheat, are one and the same thing. They certainly are not. The distribution of an estate is the act of setting off their respective shares of the estate to those who claim under the decedent. The declaration of an escheat is a decision that the title of the decedent has terminated, and that an outside party not claiming under the decedent is entitled to the possession of the property by reason of a reversion upon failure of an intermediate estate. The declaration of an escheat is not the exercise of the probate function. In this connection we call the court's attention to the fact that the principal powers of judicial officers under the Anglo-Saxon jurisprudence which we have inherited are of four kinds (although there are other lesser ones): Legal, Equitable, Criminal and Ecclesiastical. Although the modern tendency, under Codes, has been to abolish differences in procedure as much as the nature of the subject matter will allow, still these different judicial functions are entirely separate and distinct. They acquire jurisdiction by different kinds of *mesne* process. Their issues are made by different kinds of pleadings. They hear different kinds of evidence and require different degrees of proof. They enter different kinds of judgments, giving totally distinct kinds of relief or imposing distinctly different penalties. They issue entirely distinct and separate kinds of judicial process. There is no such thing as intermingling these different functions except in cases where the legislature by express enactment has seen fit to so authorize. With

these premises, we answer the judge's question emphatically "No," for three reasons: 1st, Because when the judge has by a process of elimination reached the conclusion that there is no one claiming under the decedent to whom to distribute the estate, he has at the same time reached the conclusion that his probate jurisdiction has ceased. 2d, The probate proceedings culminating in a distribution are based upon certain *mesne* process, in this case a four weeks' publication. The process which would be necessary to sustain the jurisdiction of the court for escheating purposes would be a twelve weeks' publication. Therefore the court no longer has jurisdiction of the subject matter, for lack of process on which to base his further acts. 3d, To allow a person hitherto an entire stranger to the proceedings to suddenly come into the same and undertake to assert a legal right to divest others of the title to property, would be to suddenly transfer the cause from the ecclesiastical court to the court of common law. Let us look at some of the things which could be done if what is here sought to be done, were allowed.

A man is indicted for obtaining money under false pretenses. It transpires it was an honest loan. The parties are all before the court. Why not render a monetary judgment in favor of the prosecuting witness and against the criminal? Or invert the case.

One man sues another for a sum of money which he gave him. It transpires that the money has been repaid, but was originally obtained by false pretenses. Why not sentence him to the penitentiary?

The administration of an estate is begun in the probate court, the decedent having left real property. It transpires that upon this property there is a mortgage and also a mechanic's lien. Why not allow both the mortgagee and the lien claimant to come into the probate court and enforce their encumbrances? The land is before the court, the persons claiming under the decedent are before the court. What harm is done by letting in a couple of strangers and letting the probate court try its hand at exercising equitable functions?

These illustrations we admit are silly and ridiculous, but they are exactly analogous in principle to what was done by the territorial probate court in the case at bar. To our way of thinking it borders on the humorous to suggest that a court by finding a successive series of facts, can by a process of elimination, destroy its own jurisdiction over the subject matter, and *co instanti* that it disappears, acquire a new jurisdiction for a different purpose.

CONCLUSION.

We believe that we have shown many good reasons which conclusively establish the four propositions for which we have contended, namely:

I. No facts on which to base laches and estoppel are shown in the complaint, nor could they be set up as defenses to this action.

II. The territorial County of King, to whose title, if any, the defendant succeeds, never acquired any title to the land in question by escheat.

III. The proceedings in the territorial probate court were in legal effect an absolute nullity.

IV. The statute of limitations does not apply because the possession of the defendant is not adverse.

Such being the case, this cause should be reversed and remanded to the district court with instructions to overrule the demurrer to the amended complaint, and proceed with the action according to due course of law.

We are fully aware that we have got a case which at first glance provokes antagonism of those to whom it is submitted, for two reasons: 1st, because more than forty years have elapsed since the county took possession of this land, and, 2d, because it is an attempt to take very valuable property from a county, which is the representative of the people.

Our client's cause is righteous. Our client is claiming for himself and his co-heirs, the property which rightfully belonged to their ancestor, Lars Torgerson. If it has become immensely valuable, both legally and morally they are entitled to the unearned increment produced by the growth of the city of Seattle and the State of Washington. The county never paid a dollar for the land, and has no legal or moral claim to it. It simply found it vacant and attempted to appropriate it. What improvements it has placed upon

the same, we are not seeking to take from it, for though a portion of them would be legally ours, none of them would be morally. We expect that counsel will repeat the argument which they made in the court below that public policy forbids depriving a municipality of such valuable property, and that the trial judge should sustain the demurrer because it would cost the county so much to defend the suit upon the merits. The only comment that we will make upon this style of argument is to quote to this court the language of Stephen J. Field, then Chief Justice of California, in *McCracken vs. City of San Francisco,* 16 Cal. 633, in a case involving approximately a half million dollars, as does the one at bar, where he said: "Be this, however, as it may, it can have no weight in the determination of the case. It is our duty to pronounce the law, and with the consequences which follow we have nothing to do—whether they be to cast upon the city a liability of one dollar or of a million." And in this connection it would not be inappropriate to remind the court of the famous saying of Chief Justice Sharswood of Pennsylvania that: "It is the duty of a judge to hew to the line, let the chips fall where they may."

Respectfully submitted,

EDWARD JUDD,
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